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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 1915

LESTER L. PERKINS, D.V.M.,

Appellant,

v.

HOWARD SMITH, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

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Robert Cuff, Jury Commissioner for Montgomery County and State of Maryland.

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Table of Contents

	PAGE
Motion to Affirm	1
Statement	1
Argument	2
Conclusion	6

Table of Citations

Cases

In re Griffiths, 413 U.S. 717 (1973)	2
Graham v. Richardson, 403 U.S. 365	3
Hinton v. Hinton, 145 S.E. 615 (N.C., 1928)	3
Reich v. State, 21 Am. Rep. 265 (Ga., 1874)	3
State v. Quarrel, 1 Am. Dec. 637 (S.C., 1798)	3
Strauder v. West Virginia, 100 U.S. 303 (1880)	3
Jugiro v. Brush, 140 U.S. 291 (1891)	3
Carter v. Jury Commissioner of Greene County, 396 U.S. 320 (1970)	3
Peters v. Kiff, 407 U.S. 493, 503 (1972)	4
Brown v. Allen, 344 U.S. 443, 474 (1953)	4
United States v. Ross, 468 F.2d 1213 (9th Circ., 1972)	4
Shelby v. State, 479 S.W.2d 31 (Texas, 1972)	4
United States v. Bennett, 445 F.2d 638 (9th Circ., 1971)	4
Green v. State, 462 P.2d 994 (Alaska, 1969)	4
Camp v. United States, 413 F.2d 419 (5th Circ., 1969)	4
Hoyt v. Florida, 368 U.S. 57 (1961)	4
Sugarman v. Dougall, 413 U.S. 634, 642 (1973)	5
Duncan v. Louisiana, 391 U.S. 145, 186 (1968)	5

Statutes

Rules of the Supreme Court of the United States, Rule 16	1
24 Cyclopedia of Law & Practice, Juries, Sec. 9	3

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Appellees Howard Smith, Clerk, Circuit Court for Montgomery County, Robert Cuff, Jury Commissioner for Montgomery County and State of Maryland, pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the final judgment and decree of the district court be affirmed on the grounds that the issue raised by appellant does not amount to a substantial federal question and that further argument in this matter is not necessary.

STATEMENT OF THE CASE

Appellees concur in appellant's Statement of the Case except that they do not agree that appellant, being an alien, could meet all the requirements and qualifications for service as a juror in the State and Federal Courts in Maryland.

ARGUMENT

The District Court considered the various reasons advanced as justifying the exclusion of aliens from jury service — ". . . that it is reasonable to limit such service to those who participate in and manifest an interest in the affairs of citizenship, that aliens as a class will be less qualified than citizens from the standpoint of familiarity with local laws, customs and language to fully understand the actions and motives of litigants, that aliens do not owe sole and permanent allegiance to the United States, and that jury service is a unique responsibility going to the heart of representative government and as such should be entrusted only to citizens". The court then upheld the exclusionary laws, concluding that as a class citizens are more likely to make informed and just decisions than are non citizens. Circuit Judge Winter concurred on the basis of the presumed commitment of a citizen to the proper enforcement and application of the laws of the United States and of the State of Maryland. Judge Winter noted that, unlike knowledge of a language, law or custom, this commitment and possible conflicting loyalty of a non citizen, is not susceptible of objective measurement. Appellant relies heavily on *In re Griffiths*, 413 U.S. 717 (1973), and contends that ". . . the problematic impact on the justice system by resident-alien jurors is obviously neither more nor less than the impact on that system by resident-alien lawyers". This contention however overlooks this issue of possible conflicting loyalties, for the matter of the loyalty to our laws and government of an attorney, an admitted advocate of a position in a legal proceedings, is insignificant in comparison to the absolutely indispensible requirement of loyalty on the part of a juror whose role is clearly not that of an advocate.

It must be conceded that, in many instances, an alien is considered a "person" for the purpose of rights guaranteed

under the Constitution. *Graham v. Richardson*, 403 U.S. 365. However, a review of the cases so holding, as cited in footnote 5 of the District Court's decision, reveals that they have dealt with denials of economic benefits, and the cases generally note that such denials could affect the ability of aliens to enter or remain in this country, thus impinging upon an area of control expressly reserved to the Congress. The disqualification of aliens from jury service appears to have existed at common law. *Hinton v. Hinton*, 145 S.E. 615 (N.C., 1928); *Reich v. State*, 21 Am. Rep. 265 (Ga., 1874); *State v. Quarrel*, 1 Am. Dec. 637 (S.C., 1798); 24 Cyc. of Law & Practice, Juries, Sec. 9. There have been several pronouncements on this subject by this Honorable Court. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), it was stated at page 310:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. . . ."

In *Jugiro v. Brush*, 140 U.S. 291 (1891), this Court stated at page 298:

> "And so far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several States may be restricted to citizens of the United States. It rests with each State to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination, in respect to such service, be made against any class of citizens solely because of their race. . . ."

More recently, this Court stated in *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970) at page 332:

> "It has long been accepted that the Constitution does not forbid the States to prescribe relevant qualifi-

cations for their jurors. *The States remain free to confine the selection to citizens*, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. 'Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty'." (Emphasis supplied.)

See also the reference to the identifiable class of "citizens" in *Peters v. Kiff*, 407 U.S. 493, 503 (1972); *Brown v. Allen*, 344 U.S. 443, 474 (1953); and the many cases upholding juries composed only of registered voters (and hence citizens). *United States v. Ross*, 468 F.2d 1213 (9th Circ., 1972); *Shelby v. State*, 479 S.W.2d 31 (Texas, 1972); *United States v. Bennett*, 445 F.2d 638 (9th Cir. 1971); *Green v. State*, 462 P.2d 994 (Alaska, 1969); and *Camp v. United States*, 413 F.2d 419 (5th Circ., 1969).

The District Court, in upholding the statutes in question, applied the "compelling state interest" test rather than the "rational basis" test. It appears that meeting the latter test would have sufficed. See *Hoyt v. Florida*, 368 U.S. 57 (1961), a case involving exclusions from jury service, where the Court stated at page 61:

> "Where, as here, an exemption of a class in the community is asserted to be in substance an exclusionary device, the relevant inquiry is whether the exemption itself is based on some reasonable classification and whether the manner in which it is exercisable rests on some rational foundation."

As indicated by the District Court, however, the statutes would be upheld under either test. The states may limit participation in government to those who are within the

basic conception of a political community. *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973). One cannot readily envision a more direct, and sensitive, participation in government than grand and petit jury service. *Duncan v. Louisiana*, 391 U.S. 145, 186 (1968) (dissenting opinion of Justices Harlan and Stewart). In addition to the pure constitutional arguments are the practical considerations of the matter. Appellant would surely concede that many persons in his "class" are clearly unqualified, since his "class" includes, *inter alia*, persons who have only recently arrived in this country, persons who have difficulties with the English language, persons from countries hostile to the United States, and persons from backgrounds far removed from those of citizens of this country. As noted above, a test of loyalty, of familiarity with customs and practices, and of other qualities required of a juror would not be feasible. But if indeed such testing could be devised, the result would be to carve out of the class of aliens an "elitist group" of those found acceptable for jury duty. This in itself might well present constitutional problems as running contrary to the required random selection for jury duty from a fair cross-section of the community.

Finally, it should be noted that appellant has not alleged that he is, or is about to become, a litigant in a criminal or civil proceedings to be tried by a jury. Thus, he is asking for the right to serve on the jury rather than the right to be tried by a jury. The composition of a jury is normally examined in a more timely manner by a challenge to the array by a litigant in a pending jury trial.

In view of the rule of common law excluding aliens from jury service, in effect at the time of adoption of our constitution and in effect in this country at the time the applicable amendment to the constitution were ratified; in view of the aforementioned pronouncements on the matter by

this Honorable Court; and in view of the good and compelling reasons for excluding aliens as set forth above, it is respectfully submitted that appellant has not raised a substantial federal question and the decision of the lower court, therefore, should be affirmed.

CONCLUSION

Appellees respectfully submit that, in the absence of substantial question to be decided, the judgment and the decree of the district court should be affirmed.

Respectfully submitted,

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